



B.C.'S NEW *INSURANCE ACT*
Making the Transition to the
New World Order

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B.C.'S NEW INSURANCE ACT: Making the Transition to the New World Order

Executive Summary

In 2003, a lawyer's negligence case involving a missed limitation period resulted in a Supreme Court of Canada decision declaring that BC's *Insurance Act* was "outmoded", "incapable of coherently addressing the modern multi-peril policy", and resulted in "unproductive, wasteful litigation about technicalities" *KP Pacific Holdings Ltd. v. Guardian Insurance* [2003] 1 S.C.R. 433 ("*KP Pacific*").

The case dealt with the limitation period applicable to the coverage enforcement action under an all risk property policy. The Court held that such a policy could not be "shoe-horned" into the Fire Part of the *Insurance Act* and instead applied the longer limitation period stipulated by the General Provisions (Part 2) of the Act. It specifically urged the legislatures across the country to "rectify this situation".

In 2009 the BC Legislature finally got around to amending the *Insurance Act*. These amendments included some significant changes, including such things as:

- Eliminating the "Fire Part" of the Act altogether and instead expanding the "General Provisions" part of the Act so as to apply to virtually all types of property and liability insurance;
- Importing the requirement of Statutory Conditions for both property and liability policies;
- Importing "proportionate contributions" as between overlapping policies;
- Imposing a base two (2) year limitation period for coverage enforcement lawsuits against the insurer;
- Enacting an "unjust contract provision" preventing coverage denials where they are considered either unjust or unreasonable in the circumstances of any given case;
- Introducing the concept of "innocent persons" to whom the "criminal or intentional act" exclusion would not be applicable and who would be allowed to recover their "proportionate interest" in lost or damaged property;
- Mandating coverage for all fire losses except those permitted to be excluded by regulations; and
- Allowing electronic delivery of certain insurance records or documents.

The amendments to the Act contemplated terms, conditions or exceptions to be clarified by government regulation. The whole regime (amendments plus regulations) took effect July 1, 2012. Insurers ought to have revised policy wordings to reflect the necessary changes.

The new regulations include the following changes to BC's property and casualty insurance regime:

- The statutory conditions are excluded for certain classes of insurance but will still be applicable to most property and all liability coverages;
- The current fifty (50) separate classes of insurance are being reduced to twenty (20) so as to harmonize insurance classification with the federal regime;
- Insurers must provide written notification to a claimant of the limitation period applicable to any coverage enforcement action within as little as five (5) business days of any claim denial and failure to comply with such notice provisions operate to suspend that limitation period;
- Only "natural persons" (human beings) will have the benefit of the "innocent co-insured" provision in the Act and in order to obtain such protection, such insureds must cooperate with the loss investigation, submit to examinations under oath and produce requested documents;
- Arson *can* be a fire coverage exclusion but it is subject to the "innocent co-insured" provision;
- Fire coverage is mandatory for any fire loss occurring while the insured property is vacant for up to thirty (30) days;
- Exclusions for fire following earthquake are not permitted;
- Notice of termination of a contract pursuant to a statutory condition or for non-payment of premium *cannot* be delivered electronically;
- Insurers must provide the insured with written notice of the dispute resolution process (appraisal) under the Act within ten (10) days after a dispute has arisen or within seventy (70) days after submission of a Proof of Loss if no coverage/payment determination has been made; and
- With only some limited exceptions, all insurers who are authorized to conduct business in BC must be a member of the General Insurance OmbudService for the purpose of addressing "insurer complaints".

Obviously, several of these changes require "tweaking" of policy wording, whether with respect to statutory conditions, limitation periods or the narrowing of exclusions. Mind you, even though the Supreme Court of Canada ruled in 2003 that the one (1) year limitation found in the fire statutory conditions did *not* apply to coverage enforcement actions under the modern "all-risk" policy, virtually no insurers changed their wording to reflect that decision. Presumably there will be a little more interest in amending wording this time around given that the changes are effectively mandated by legislation.

Transitional provisions have been included in the New Act to cushion the blow to insurers in some cases until policies are renewed or replaced.

Essentially the same changes were made in Alberta and those came into effect on July 1, 2012 as well. Other provinces are also following suit. In May 2012, Manitoba introduced Bill 27 and changes to the *Ontario Insurance Act* were included as Schedule 31 of Budget Bill 55. Many of the changes in Manitoba and Ontario are similar to those changes in British Columbia and Alberta.

I. Introduction

In 2003 a lawyer's negligence case resulted in the Supreme Court of Canada declaring that B.C.'s Insurance Act was "outmoded", "incapable of coherently addressing the modern multi-peril policy", and resulted in "unproductive, wasteful litigation about technicalities": *KP Pacific Holdings Ltd. v. Guardian Insurance* [2003] 1 S.C.R. 433 ("*KP Pacific*").

In *KP Pacific* the insured claimed for a fire loss under an all risk policy. The policy contained the standard statutory conditions mandated by the "Fire Part" of the BC Insurance Act which included the litigation limitation period of one year following occurrence of the loss. The question in the case was whether the limitation period was the one stipulated by the statutory condition or the longer limitation period stipulated in the "General Provisions" of the Act, namely, one year from the filing of a proof of loss. The more general issue was whether the modern all-risk policy was governed by the Fire Part of the Act (including the statutory conditions) or the General Provisions of the Act.

The Court ultimately held that an all-risk policy could not be "shoe-horned" into the Fire Part of the Act and instead applied the longer limitation period stipulated by the General Provisions (thereby saving the arguably negligent lawyer from liability for missing the limitation period). The Court noted the history of the legislation which was "built on the premise of discrete policies for discrete subject matters, with limited overlap" which was now an "outmoded paradigm incapable of coherently addressing the modern multi-peril policy". The Court urged,

"It is our hope that legislatures will rectify this situation by amending the *Insurance Act* to provide specifically for comprehensive [all-risk] policies. In an insurance era dominated by comprehensive [all-risk] policies, it is imperative that Canada's Insurance Acts specifically and unambiguously address how these statutes are to operate and the rules by which comprehensive policies are to be governed.

It would be highly salutary for the Legislature to revisit these provisions and indicate its intent with respect to all-risks and multi-peril policies. In the meantime, the task of resolving disputes arising from this disjunction between insurance law and practice falls to the courts. Brown and Menezes lament: "Surely there can be little which is less productive, or more wasteful, than litigation about such technicalities": C. Brown and J. Menezes, *Insurance Law in Canada* (2nd ed. 1991), at p. 16. I whole-heartedly agree."

It took a long time but in due course the legislatures of both Alberta and British Columbia responded to the challenge. Both provinces passed legislation amending their respective Insurance Acts. Some of the amendments to the Acts contemplated terms, conditions or exceptions to be clarified by government

regulation. It took almost three years for those regulations to be introduced and the new regimes (amendments plus regulations) in Alberta and British Columbia came into force on July 1, 2012. Significant changes were introduced and the wordings of both property and liability policies will have to be modified.

This paper reviews the amendments and regulations which have been brought into force in British Columbia and urges insurers to revise policy wordings to reflect the necessary changes.

II. Summary of Changes by Topic:

A. Structural Reform

The Supreme Court in *KP Pacific*, supra noted that:

The *Insurance Act* was passed in 1925 (S.B.C. 1925, c. 20). Despite repeated housekeeping amendments, it remains essentially unchanged. It was designed for a world where insurers issued policies geared to specific risks and subjects, such as fire insurance, theft insurance, business loss insurance, and so on. Accordingly, it lays down rules, including limitation periods, based on different and discrete categories of insurance.

The previous Insurance Act in British Columbia contained separate provisions applying to Life Insurance (Part 3), Accident and Sickness Insurance (Part 4) and Fire Insurance (Part 5), prior to its repeal in June 2007 Auto Insurance (Part 6) and Miscellaneous Insurance (Part 7). An omnibus General Provisions (Part 2) applied to virtually all other forms of insurance, including the commonplace “all risk” property policy, as well as all forms of general liability insurance.

Under the new regime Part 5 relating specifically to Fire Insurance is completely eliminated and consequently largely all forms of property and liability policies are now governed by the General Insurance Provisions in Part 2 of the New Act.

The New Act sees many of the former Part 5 provisions, which related solely to property insurance, transferred in slightly amended form into the new Part 2. In several instances, it appears the legislature may not have given much thought to the application of property insurance concepts to liability insurance policies.

Part 2 of the New Act retains the concept of “Statutory Conditions” (section 29). Section 29(3) says that Statutory Conditions 1 and 6-13 apply only to property insurance, which means that Statutory Conditions 2 (property of others), 3 (change of interest), 4 (material change and risk) and 5 (termination of insurance) all apply to liability policies. In other words, it will now be possible for a liability insurer to void coverage because there has been a “material change to the risk” that has not been promptly notified to the insurer.

Similarly, Section 30 of the New Act re-enacts the proportionate contributions clause into Part 2 General Provisions and provides:

(1) If, on the happening of loss or damage, there is in force more than one contract covering the loss or damage, the insurers under the respective contracts are each liable to the insured for their rateable proportion of the loss, unless it is otherwise expressly agreed in writing between the insurers.

(2) For the purpose of subsection (1), a contract is deemed to be in force despite any term or condition of it that the contract does not cover the loss or damage or attach, come into force or become insurance with respect to the loss or damage until after full or partial payment of any loss under any other contract.

(3) Nothing in subsection (1) affects

(a) the validity of any divisions of the amount of insurance into separate items,

(b) the limits of insurance on specified property,

(c) a clause referred to in section 31, or

(d) a contract condition limiting or prohibiting the having or placing of other insurance.

(4) Nothing in subsection (1) affects the operation of a deductible clause, and

(a) if one contract contains a deductible clause, the prorated proportion of the insurer under that contract must be first ascertained without regard to the clause, and then the clause must be applied only to affect the amount of recovery under that contract, and

(b) if more than one contract contains a deductible clause, the prorated proportions of the insurers under those contracts must be first ascertained without regard to the deductible clauses, and then the highest deductible must be prorated among the insurers with deductibles, and these prorated amounts affect the amount of recovery under those contracts.

(5) Nothing in subsection (4) is to be construed to have the effect of increasing the prorated contribution of an insurer under a contract that is not subject to a deductible clause.

(6) Despite subsection (1), insurance on identified articles is a first loss insurance as against all other insurance.

On its face, this provision applies to liability policies as well as property policies and it remains to be seen whether it has the (inadvertent?) effect of overriding the overlapping coverage analysis as set out by the Supreme Court of Canada in *Family Insurance Corp. v. Lombard Canada Ltd.* 2002 SCC 48.

The provisions in Part 7 of the Old Act involving livestock insurance are also eliminated and it is left to the legislature to make regulations applying specified provisions of Part 2 to home warranty insurance or deposit protection contracts.

The General Provisions (Part 2) will not apply to life insurance or accident and sickness insurance, which remain governed by Parts 3 and 4 respectively.

As an aside, the amendments also repealed the *Insurance (Marine) Act*. In its News Release the government stated that "(m)arine insurance contracts are exclusively a matter of federal jurisdiction, and are subject to the federal Marine Insurance Act".

Regulations concerning Structural Reform

According to s. 5 of B.C. Reg. 213/2011, the following classes of insurance are excluded from the application of the Statutory Conditions: aircraft insurance, boiler and machinery insurance, credit insurance, credit protection insurance, hail insurance, mortgage insurance, product warranty insurance, title insurance and travel insurance or vehicle warranty insurance. However, the Statutory Conditions are applicable to most property and all liability coverages.

Pursuant to B.C. Reg. 204/2011 under the *Financial Institutions Act*, the number of separate classes of insurance have been reduced to twenty (20) so as to harmonize insurance classification with the federal regime.

B. Clarifying Limitation Periods

In its March 2007 Discussion Paper, the BC government indicated that during the consultation process clarification of limitation periods was identified as a priority issue by many stakeholders:

Streamlining the current inconsistent limitation periods is seen as necessary to reduce confusion for consumers, advisors and insurers, all of whom need certainty in order to appropriately deal with insurance claims.

In 2003 the Supreme Court of Canada in *KP Pacific, supra* and *Churchland v. Gore* [2003] 1 S.C.R. 445, 2003 SCC 26 held that the limitation period for property claims under an all risk policy was one year from the furnishing of a "reasonably sufficient proof of a loss" on a claim under the contract. However, left uncertain was what constituted such "reasonably sufficient proof" and such debate became the cornerstone of limitation litigation.

The New Act attempts to streamline the limitation period debate so as to "reduce confusion for consumers, advisors and insurers all of whom need certainty in order to appropriately deal with insurance claims." [Discussion Paper].

Under the New Act, limitation periods will change with two years being the norm. Under Section 23 the limitation period for property policies will be two years after the insured knew or ought to have known the loss or damage occurred and, in any other case, two years after the cause of action against the insurer arose.

With life insurance the limitation period under section 76 is two years after the proof of claim is furnished or six years from the date of death or in the case of insurance money payable on a periodic basis, the date the insurer fails to make a periodic payment.

Section 6(1) applies section 7 of the *Limitation Act* to limitation periods under the New Act, which has the effect of extending those limitation periods for persons under a legal disability. For example, if the insured is a minor the limitation period only starts to run once they reach 19 years of age. In regards to other persons under a legal disability the time only begins to run once they are no longer under such a disability.

British Columbia introduced a new *Limitation Act* that will come into force on June 1, 2013. It replaces limitation periods of between 2 and 10 years with a single 2 year limitation period for most civil claims, starting the day on which the right to make a claim was "discovered" (knowledge of damage caused by a wrongful act or omission for which a court action might lie). Unless exempted, the "ultimate" (upper limit) limitation period for bringing a lawsuit has been reduced from 30 years to 15 years from the date on which a wrongful act or omission occurred. The *Limitation Act* does not apply where other legislation sets its own limitation periods, such as the *Insurance Act*. In short, the limitation provisions in the New Act can be summarized as:

| Type of Policy | Section | Limitation Period |
|--|---------|--|
| Property Policy | 23 | 2 years from the date the insured "knew or ought to have known the loss or damage occurred". |
| All other Part 2 policies (ie: liability policies) | 23 | 2 years from the date "the cause of action against the insurer arose". |
| Life Insurance – Death | 76 | The later of: <ul style="list-style-type: none"> • 2 years after the proof of claim is provided, or • If no proof of loss is provided, 6 years after the date of the death. |
| Life Insurance – Actions not from death | 76 | 2 years after the date the insured knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim for insurance money In the event of money payable on a periodic basis, 2 years after the date the insurer failed to make payment. |

| Type of Policy | Section | Limitation Period |
|---|---------|--|
| Accident and Sickness Insurance – Death | 104 | The later of: <ul style="list-style-type: none"> • 2 years after the proof of claim is provided, or • If no proof of loss is provided, 6 years after the date of the death. |
| Accident and Sickness Insurance – Actions not arising from death | 104 | 2 years after the date the insured knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim for insurance money In the event of money payable on a periodic basis, 2 years after the date the insurer failed to make payment. |

Regulations concerning Limitation Periods

Under s.4 of B.C. Reg. 213/2011, insurers must provide written notification to a claimant of the limitation period applicable to any coverage enforcement action within as little as five (5) business days of any claim denial. Failure to comply with such notice provisions operate to suspend that limitation period.

C. Subrogation

At common law in order for the insurer to have full subrogation rights, including the exclusive right to control the litigation, the insurer must have fully indemnified the insured for the loss. This does not mean that the insurer has paid out the maximum allowable under the policy; it means that the insured must have been **fully** indemnified for the loss. So, at common law, and subject to statute and contract, where an insurer is attempting to enforce the insured's rights against a third party, the insurer must have fully indemnified the insured before it can recover from the third party or have exclusive control over the litigation [*Farrell Estates Ltd. v. Canadian Indemnity Co.*(1990), 69 D.L.R. (4th) 735 (BCCA)].

Many insurers' policies contain provisions which apply for the insurer to exercise the right of subrogation as soon as any payment is made under the policy, and not only in the instance of full indemnity. Section 130 of the Old Act eliminated the prerequisite of full indemnity for subrogation in regards to policies covered under the Fire Part. Section 36 of the New Act is similar and provides that:

Subrogation

36 (1) The insurer, on making a payment or assuming liability under a contract, is subrogated to all rights of recovery of the insured against any person, and may bring an action in the name of the insured to enforce those rights.

(2) If the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage

suffered, that amount must be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively.

The re-enactment of this section within the “General Insurance Provisions” extends the right of subrogation absent full indemnity to virtually all types of insurance policies.

D. Unjust Contracts Provision

Section 2 of the New Act expressly stipulates that Part 2 (General Insurance Provisions) applies to every contract, with certain exceptions that will not be applicable to the property and casualty industry. This means the sections in question apply to not just property insurance, all-risk or otherwise, but every conceivable form of liability insurance as well, including Commercial General Liability (CGL), Directors and Officers insurance (D&O), professional Errors and Omissions insurance (E&O), excess/umbrella policies and so on.

The Fire Part of the Old Act contained a provision respecting “unjust exclusions” as follows:

129 If a contract

...

(b) contains any stipulation, condition or warranty that is or may be material to the risk, including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

The new provision provides as follows:

Unjust Contract Provisions

32 If a contract contains any term or condition . . . that is or may be material to the risk, including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried. (emphasis added)

Section 13(2) of the Old Act provided (and the amendments will continue to provide) that “the question of materiality is one of fact”. The courts have decided that “materiality” imports an objective test of whether any prudent insurer in the normal practice of the insurance business would be influenced whether to accept/decline the risk or to stipulate a higher premium or other limitations: e.g. *Kehoe v. British Columbia Insurance Co.* (1993) 79 B.C.L.R. (2d) 241 (CA); *Kruska v. Manufacturers Life Insurance*

Co. (1984) 54 B.C.L.R. 343 (SC), affirmed (1985) 63 B.C.L.R. 209 (CA); *Wells v. Canadian Northern Shield*, 2007 BCSC 1844.

It is difficult to conceive of any policy exclusion that would not be “material to the risk”. After all, if the underwriter was prepared to assume the risk referred to in the exclusion, it would not have inserted the exclusion in the first place! With the new provisions, it will be arguable that every policy exclusion is “material to the risk” and therefore is “not binding” on the insured should it be “unjust or unreasonable”. This in turn probably means that every denial of coverage an insurer may make in the future based on an exclusion is going to be countered by a wide variety of imaginative arguments why the denial is unjust or merely unreasonable in the circumstances. The flood gates may well be opening.

The new provision could also serve to strip insurers of the protection traditionally afforded by a warranty. In insurance law, the characterization of a policy term as a “warranty” imports a requirement of strict compliance by the insured, the breach of which discharges the insurer from all liability under the policy even if the loss had no connection whatever to the breach (see *Automotive Products Company Ltd. v. Insurance Company of North America* [1969] S.C.R. 824). If the loss in any given case has no connection to the actual breach of the warranty, it is not difficult to see how a court might conclude a denial based on that warranty is “unreasonable” and therefore not available to the insurer by virtue of new Section 32 of the *Act*.

The “unjust or unreasonable” provision of the Old Act was considered by the Supreme Court of Canada in *Marche v. Halifax Insurance Co.* 2005 SCC 6. In that case, the insured’s house, which had been converted into two apartments, remained vacant for a period of time before a tenant moved in. Such vacancy amounted to an unreported change material to the risk triggering Fire Statutory Condition 4 which provided that it “shall avoid the contract as to the part affected thereby”. In other words, the unreported vacancy rendered coverage void.

The property was subsequently destroyed by fire after a tenant had in fact moved into the premises and therefore the property was no longer vacant. The court was then called upon to decide whether it would be “unjust or unreasonable” to uphold the voiding of the policy (and therefore the denial of coverage) even though the default (unreported vacancy) had in effect been cured by the time the fire occurred. The Supreme Court of Canada answered this question affirmatively observing that,

- the “unjust or unreasonable” relief provision in the *Act* applied not only to make unenforceable policy conditions that are unreasonable on their face but also to relieve against the results of applying policy conditions that, in the particular circumstances of the case, are unreasonable in their application or draconian in their consequences;
- the unjust or unreasonable provision applied to statutory conditions just as much as to other policy terms and conditions;
- such an interpretation avoids inequitable results and corresponds with the remedial objectives of the provision; and
- in the present case, because the vacancy (and the material change in risk) had been rectified prior to the loss, it was clearly unreasonable to enforce Statutory Condition 4 in the circumstances.

Because (1) the “unjust or unreasonable” provision is now contemplated to apply to all property and casualty policies not just fire policies and (2) because most policy conditions and exclusions are “material to the risk” in some fashion, it will now be possible to contest a wide variety of coverage denials on the grounds that applying policy provisions to that effect is either unjust or unreasonable in the circumstances of any given case.

E. Coverage for Innocent Co-Insureds

Previously, if there was more than one insured under a policy, whether it was a CGL or a property policy, it was possible to exclude coverage for all insureds even if the loss was caused by the criminal or intentional act of just one of them. Of course there has been much judicial dancing on the head of a pin in regards to use of the words “the” and/or “any” in such exclusions. Hence, in arson cases coverage has been denied with respect to the interests of “innocent” co-insureds who are not in any way implicated in the arson: *Scott v. Wawanesa Mutual Insurance Co.* [1989] 1 S.C.R. 1445; *Riordan v. Lombard Insurance Co.* 2003 BCCA 267; *Torchia v. RSA Insurance* [2004] O.J. No. 2316 (CA). So too with CGL policies where, depending on the wording, intentional assault by one insured affected coverage for all insureds: see e.g. *Bluebird v. Guardian Insurance* 1999 BCCA 0195.

The New Act provides “proportionate coverage” for such “innocent persons” in the future:

Recovery by innocent persons

- 35 (1) Despite section 5, if a contract contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person
- (a) whose act or omission caused the loss or damage,
 - (b) who abetted or colluded in the act or omission,
 - (c) who
 - (i) consented to the act or omission, and
 - (ii) knew or ought to have known that the act or omission would cause the loss or damage, or
 - (d) who is in a class prescribed by regulation.
- (2) Nothing in subsection (1) allows a person whose property is insured under the contract to recover more than their proportionate interest in the lost or damaged property.
- (3) A person whose coverage under a contract would be excluded but for subsection (1) must comply with any requirements prescribed by regulation.

Although the language of Section 35(1) is actually ambiguous and could arguably apply to a liability policy as well, it is clear from Section 35(2) that the provision is meant to apply only to property policies. It authorizes innocent co-insureds to “recover . . . their proportionate interest in the lost or damaged property”. The “Discussion Paper” issued by the BC government in March 2007 with respect to the proposed changes to the *Insurance Act* said nothing about the concept of “proportionate interest” and it is not clear precisely what it means. If it is commercial property owned by a partnership does each “innocent” partner recover a percentage of actual cash value that is the same as his percentage interest in the partnership? If two spouses own the home jointly does the “innocent” spouse recover 50% of the value of the home? Does she recover 100% of the value of her own clothes and 0% of her “not so innocent” husband’s, or 50% of the value of both their respective owned contents?

Section 35(3) does intimate that there will be “requirements prescribed by regulation” for such innocent co-insureds. Perhaps they will address the concept of “proportionate interest”, among other uncertainties.

Regulations concerning Innocent Co-Insureds

Thus far, only one such regulation has been prescribed – s. 7 of B.C. Reg. 213/2011. Only “natural persons” (human beings) will have the benefit of the “innocent co-insured” provision in the Act and in order to obtain such protection, such insureds must cooperate with the loss investigation, submit to examinations under oath and produce requested documents.

F. Mandatory Fire Loss Coverage

As indicated above, the *KP Pacific* case determined that the modern day “all-risk” property policy was not a “contract of fire insurance” which attracted the application of Part 5 (Fire Insurance) of the Old Act. That determination effectively ended any debate as to whether insurers in BC were required by law to extend coverage for “fire following”, i.e. fires that ensued as a result of some other excluded peril such as an earthquake etc. The argument that such “mandatory” fire coverage existed was derived from Section 122(1)(a) which essentially provided that “any contract to which [the Fire Insurance] Part applies . . . is deemed to cover the insured property against fire, whether resulting from explosion or otherwise . . .”. The Fire Insurance Part of the Act excepted policies where “the peril of fire is an incidental peril to the coverage provided” and so debate would ensue whether fire might constitute an “incidental peril” to, say, an earthquake policy, such that it could properly be excluded from coverage.

The new legislation eliminated the debate and mandates coverage for fire loss “however the fire is caused and in whatever circumstances”:

Exclusions from coverage

- 33 (1) An insurer must not provide in a contract that includes coverage for loss or damage by fire, or another peril prescribed by regulation, an exclusion relating to the cause of the fire or peril other than an exclusion prescribed by regulation.
- (2) An insurer must not provide in a contract that includes coverage for loss or damage by fire or another peril prescribed by regulation

an exclusion relating to the circumstances of the fire or peril if those circumstances are prescribed by regulation.

- (3) An exclusion contrary to subsection (1) or (2) is invalid.
- (4) For greater certainty, subsections (1) and (2) apply in relation to loss or damage by fire, however the fire is caused and in whatever circumstances and whether the coverage is under a part of the contract specifically covering loss or damage by fire or under another part.

(emphasis added)

An issue that arises, as it does for many of these new provisions is whether the language of Section 33 is broad enough to capture liability policies in addition to property policies. It can be argued that a liability policy “includes coverage for loss or damage by fire” and, if so, liability exclusions relating to the cause of the fire would be impermissible unless they too are “saved” by a regulation. One assumes the intent of the government is to limit this provision (and others) to property policies only but the language may not be clear enough to accomplish this objective.

Regulations concerning Fire Exclusions

The above provision provides that the only permissible exclusions in a policy relating to a fire loss are those “prescribed by regulation”. Section 6 of B.C. Reg. 213/2011, describes what exclusions are permitted.

An insurer may not include any exclusion in a contract that covers loss or damage by fire or another peril unless that exclusion is prescribed by regulation. Arson *can* be a fire coverage exclusion but it is subject to the “innocent co-insured” provision. Fire coverage is mandatory for any fire loss occurring while the insured property is vacant for up to thirty (30) days. However, exclusions for fire following earthquakes are not permitted.

G. Policy Must Accord with Application

In its March 2007 Discussion Paper, the BC government indicated one of its “primary objectives” was the principle of “transparency”:

“Insurance policies should be clear, so that consumers are aware of the key policy terms, conditions and exclusions before entering into an insurance contract.” (emphasis added)

Another section which was “transferred” from the Fire Part of the Old Act to the new Part 2 General Insurance Provisions is the provision deeming coverage to accord with any application or proposal for insurance that may have been made. Former Section 124 of the Act, which notably referred only to applications in writing, will now become an arguably broader Section 15 which provides:

Policy in accordance with terms of application

- 15 After an application or proposal for insurance is made by an insured, any policy issued or coverage provided by the insurer is deemed, for the benefit of the insured, to be in accordance with the terms of the application or proposal, unless the insurer immediately gives notice to the insured in writing of the particulars in which the policy or coverage differs from the application or proposal, in which case the insured, within 2 weeks after receiving the notice, may reject the policy.

It will be noted that the former requirement of a written application has been removed and so Section 15 now applies to oral transactions as well. The section deems coverage to comply with what the insured was asking for unless “particulars of differences” are notified in writing immediately upon coverage being issued.

Again, this is a provision that would apply equally to both property and liability coverages. Someone who is seeking, say, excess liability coverage will presumably be deemed to have obtained “follow form” coverage unless the excess insurer makes a point of immediately telling the insured precisely what additional terms and limitations may apply. Whether insurers will be able to circumvent this possibly drastic outcome by insisting upon “subject to insurer’s wording” or similar clauses in application forms remains to be seen.

H. Relief from Forfeiture

While the Old Act contained a relief from forfeiture provision similar to the New Act, there is one key addition to the provision wording in the New Act. The New Act prefaces the relief from forfeiture and termination provision with the phrase “without limiting section 24 of the *Law and Equity Act*”:

Court may relieve against forfeiture and termination

- 13 Without limiting section 24 of the *Law and Equity Act*,_if
- (a) there has been
- (i) imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted by the insured with respect to the loss, and
- (ii) a consequent forfeiture or avoidance of the insurance in whole or in part, or
- (b) there has been a termination of the policy by a notice that was not received by the insured because of the insured's absence from the address to which the notice was addressed,

and the court considers it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court, on terms it considers just, may

- (c) relieve against the forfeiture or avoidance, or
- (d) if the application for relief is made within 90 days of the date of the mailing of the notice of termination, relieve against the termination.

The addition of the words “without limiting section 24 of the Law and Equity Act” in the introduction to the section clarifies that the general “relief against penalties and forfeitures” provision of the *Law and Equity Act* [RSBC 1996] c. 253 applies in addition to the provisions in the New Act.

Section 24 of the *Law and Equity Act* provides that:

Relief against penalties and forfeitures

24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

Prior to its specific mention in the New Act, the courts had been divided on the application of the *Law and Equity Act* to insurance policies. In *Saskatchewan River Bungalows v. Maritime Life Assurance*, [1994] 2 S.C.R. 490, 115 D.L.R. (4th) 478, the Supreme Court of Canada had dealt with the application of a similar provision in Alberta’s *Judicature Act* to an insurance policy. The Supreme Court of Canada noted that the power to grant relief against forfeiture is an equitable remedy and is purely discretionary. They went on to enumerate the factors to be considered by the Court in the exercise of its discretion as: the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

The Supreme Court of Canada did not specifically decide the issue of the application of the *Judicature Act* to an insurance policy but did comment that:

...the existence of a statutory power to grant relief where other types of insurance are forfeited... does not preclude application of the *Judicature Act* to contracts of life insurance. The Insurance Act does not “codify” the whole law of insurance; it merely imposes minimum standards on the industry. The appellant’s argument that the “field” of equitable relief is occupied by the Insurance Act must therefore be rejected.

While the British Columbia Courts had never specifically addressed this issue, with the amendments found in the New Act any uncertainty about the application of the *Law and Equity Act* is removed. As a result, in considering whether to exercise their discretion and grant relief from forfeiture, the Courts may apply the test under the *Law and Equity Act*.

I. Electronic Communications

When the *Insurance Act* was first introduced in 1925 the bulk of communications between insured's and insurers or their brokers and agents would have been done face to face or through the mail. Telephones were not yet in widespread use and facsimile machines, computers and e-mail remained in the arena of science fiction. It's fair to say that times have changed and the New Act strives to change with them to the extent of bringing document delivery requirements into the 21st Century.

Under s. 7 of the New Act an insurer who is required to provide any record or document may do so by electronic means in accordance with the *Electronic Transactions Act* S.B.C. 2001 c. 10.

Electronic communications

7 (1) If under this Act a record is required or permitted to be provided to a person personally, by mail or by any other means, unless regulations referred to in subsection (4) of this section or under section 149(2)(f) provide otherwise, the record may be provided to the person in electronic form in accordance with the *Electronic Transactions Act*.

(2) Despite section 2 (4) (a) and (b) of the *Electronic Transactions Act*, in this section, "record" includes a contract or declaration that designates the insured, the insured's personal representative or a beneficiary as a person to whom or for whose benefit insurance money is payable.

(3) If a record is provided in electronic form under this section,

(a) the record is deemed to have been provided by registered mail, and
(b) a period of time that, under this Act, starts to run when that record, or notification of it, is delivered to the addressee's postal address starts to run when the record is deemed received in accordance with the *Electronic Transactions Act*.

(4) The *Electronic Transactions Act* and subsection (1) of this section do not apply to a record, or in relation to a provision, under this Act that is excluded from their application by regulation.

The *Electronic Transactions Act* provides generally that:

6 A requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is

(a) accessible by the other person in a manner usable for subsequent reference, and

(b) capable of being retained by the other person in a manner usable for subsequent reference.

7 A requirement under law that a person provide information or a record organized in a specified non-electronic form to another person is satisfied if the person provides the information or record electronically and the information or record is

(a) organized in the same or substantially the same manner as the specified non-electronic form,

(b) accessible by the other person in a manner usable for subsequent reference, and

(c) capable of being retained by the other person in a manner usable for subsequent reference.

The specifics of sending or receiving information under the *Electronic Transactions Act* are found at section 18 which provides that:

18 (1) Unless the originator and addressee agree otherwise, information or a record in electronic form is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, if the information or record becomes capable of being retrieved and processed by the addressee.

(2) If information or a record is capable of being retrieved and processed by an addressee, the information or record in electronic form is deemed, unless the contrary is proven, to be received by the addressee

(a) when it enters an information system designated or used by the addressee for the purpose of receiving information or records in electronic form of the type sent, or

(b) if the addressee has not designated or does not use an information system for the purpose of receiving information or records in electronic form of the type sent, on the addressee becoming aware of the information or record in the addressee's information system.

(3) Unless the originator and the addressee agree otherwise, information or a record in electronic form is deemed to be sent from the originator's place of business and is deemed to be received at the addressee's place of business.

(4) For the purposes of subsection (3), if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction to which the information or record in electronic form relates or, if there is no underlying transaction, the principal place of business of the originator or the addressee.

(5) For the purposes of subsection (3), if the originator or the addressee does not have a place of business, the references to "place of business" in subsection (3) are to be read as references to "habitual residence".

As such, e-mail and scanned documents will satisfy the delivery requirements in the New Act. The practical considerations of this are readily apparent. For instance the requirements to deliver proof of loss forms (s. 27) is satisfied by attaching them to an e-mail. Under section 7(3)(a), these may be delivered by electronic means and will be deemed to have been provided by registered mail. If the insured has given an e-mail address for delivery the notice period starts to run when the e-mail enters the insured's e-mail account [*Electronic Transactions Act* s. 18(2)(a)]. If no e-mail delivery address has specifically been given, the time starts to run when the insured became aware of the e-mail in their inbox (by way of a "read receipt" or otherwise).

In practice, if an insurer intends to deliver documents electronically they are wise to obtain from the insured agreement as to an e-mail address for delivery and further, to request and preserve copies of read receipts.

Regulations concerning Electronic Communications

Section 2 of B.C. Reg. 213/2011 states that notice of termination of a contract pursuant to a statutory condition or for non-payment of premium *cannot* be delivered electronically.

J. Dispute Resolution

Section 9 of the former Act combined with Fire Statutory Condition 11 to provide for an "appraisal" process for disputes respecting quantum or valuation of losses under a fire policy or resulting business interruption claims. That process is now renamed "Dispute Resolution" in s. 12 of the New Act and, for property losses, is expanded to include disputes about "the nature and extent of the repairs or replacements required and their adequacy".

But this mandatory dispute resolution process is not limited to property policies. Section 12 of the Act applies to any "disputes between an insurer and an insured about a matter that under [any] condition of the contract must be determined using this dispute resolution process". So it is theoretically possible for a coverage dispute under a liability policy to be resolved by this mechanism assuming, of course, there is a policy provision which mandates same. It will be interesting to see whether insurers will embrace such an idea and amend their policy language accordingly.

The former appraisal mechanism contained no limitations with respect to the status or qualifications of the person that either side might appoint as their appraiser. The amended Act now prohibits either side's "dispute resolution representative" being either the insured or insurer itself, or an employee of

the insured or insurer. This may be an improvement of little import, since there are no other restrictions imposed by the legislation and there is nothing stopping either side from appointing their own representative with each side's biased interests to promote.

The mechanics of the dispute resolution process are essentially the same as the appraisal process as set out in the former Act. Each side appoints a representative and if they are unable to reach an agreement they appoint an umpire to determine the issue.

Regulations concerning Dispute Resolution

According to s. 3 of B.C. Reg. 213/2011, insurers must provide the insured with written notice of the dispute resolution process under the Act within ten (10) days after a dispute has arisen or within seventy (70) days after submission of a Proof of Loss if no coverage/payment determination has been made.

These new provisions will not apply if the insurer gave notice to the insured of the availability of the appraisal process before July 1, 2012 (B.C. Reg. 213/2011, s. 13(2)).

Also notable is that, with only some limited exceptions such as insurers strictly engaging in the business of reinsurance, all insurers who are authorized to conduct business in British Columbia must be a member of the General Insurance OmbudService for the purpose of addressing "insurer complaints" (B.C. Reg. 206/2011).

K. Miscellaneous Provisions:

Under s. 57(2) [life] and s. 106(3) and (4) [accident and sickness] an insured has a 30 day grace period in which to pay overdue premiums and have the insurance reinstated. However, under s. 57(2) this only applies if the person who's life is insured under the contract is alive at the time the overdue payment is made.

L. Regulations concerning Transitional Provisions

Some of the new provisions will not apply to contracts of insurance in existence as of July 1, 2012 until the contract is renewed or replaced including: the statement of the new limitation period; the application of the statutory conditions; limitation of liability clause; exclusions from coverage and fire perils insured against (B.C. Reg. 213/2011, s. 13(1)).

Also, the following new provisions will not apply if the loss or damage occurred prior to July 1, 2012: application of the limitation act; limitation period and recovery by innocent persons (B.C. Reg. 213/2011, s. 13(4)).

III. Conclusion:

The New Act represents the most substantial changes to British Columbia's *Insurance Act* since the 1960's. The Insurance Act Review Discussion paper identified 3 separate goals to be accomplished in amending the Act:

- Consumer Protection/Clarity of Contractual Provisions – to maintain and enhance consumer protection and to ensure that the rights and obligations of the parties to the contract are well-understood and clear.
- Harmonization – to harmonize insurance contract provisions with other provinces; and
- Justifiable Intervention – to minimize unnecessary government intervention in private contracts and avoid over-regulation.

It remains to be seen whether any of these goals will be achieved or whether the amendments will trigger a further round of “unproductive, wasteful litigation about technicalities”, albeit in a slightly different context.

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